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Supreme Court, U.S.
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NO. 90-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ARMANDO FONG NAJARRO AND
COMPANIA FINANCIERA LIBANO, S.A.,
Petitioners

v.

SUZANNE FRAME AND
SASI INTERNATIONAL, LTD.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals, upon reversing a Rule 56 Summary Judgment for Plaintiffs, can remand to the District Court for Summary Judgment in favor of Defendants, when Defendants did not have a Rule 56 motion before the District Court in accordance with a Rule 16 scheduling order.

2. Whether the decision of the Court of Appeals in finding for Defendants on their defense of usury, was in conflict with the Supreme Court's decision in *Celotex v. Catrett,* since neither Defendants nor the Court of Appeals ever determined or provided proof of what legal rate of interest applied, which is an essential element in determining usury.

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Petitioners, Armando Fong Najarro and Compania Financiera Libano, S.A., hereby submit their Petition for Writ of Certiorari and respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 6, 1990, the Petition for Rehearing denied and entered on August 22, 1990.

OPINIONS BELOW

The judgment and order of the U.S. District Court for the Southern District of Texas, Houston Division, the Honorable Judge David Hittner presiding, which

nted Plaintiffs' Motion for Summary Judgment on Promissory Notes and Rule 11 sanctions against Defendants and their counsel, are unreported and appear at Appendix B.

The opinion of the U.S. Fifth Circuit Court of Appeals which reversed the District Court's decision is reported at 904 F.2d 1002 (1990) and appears at Appendix A.

JURISDICTION

The opinion of the Fifth Circuit Court of Appeals was entered on July 6, 1990, and the order denying Appellees' Petition for Rehearing was entered on August 22, 1990. This jurisdictional statement was filed within 90 days of the order denying rehearing. Jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

STATEMENT OF THE CASE

A. Factual Basis For Summary Judgment.

This litigation arises out of six promissory notes given as part of a business transaction. Defendants, through published offerings and commissioned brokers actively solicited Plaintiffs and other investors to participate with them in the onging business of purchasing European "grey-market" perfume for resale in the United States.

The original company, Tenham, N.V., an offshore Dutch Antille corporation, had as its successor in 1986, SASI International, Ltd. ("SASI"), a U.K. entity with its principal offices in Lugano, Switzerland. The majority stockholder in both companies was Defendant, Suzanne Frame ("Frame"), who was also their Director.

Plaintiff, Armando Fong Najarro, is a Guatamalan citizen who is president of the entity, Compania Financiera Libano, S.A., a Panamian based company.

As part of their offerings and solicitations, Defendants represented that non-interest bearing promissory notes would be given as security for the amount of the investment, and that commissions would be paid for profits on the sale of the purchased goods.

Defendants represented in their offering that the split of profits from the sale of these goods should be 25% and paid as a commission.

Plaintiffs invested a total of $500,000.00 in six separate transactions for the purchase of perfume, for which Defendants signed and tendered non-interest bearing promissory notes. After the perfume was purchased, imported and sold, and a commission paid from profits, new notes were issued as security each time a new investment was made, until the six notes the subject of this litigation became due and payable and were not honored upon demand.

Plaintiffs brought their action for damages in the United States District Court of the Southern District of Texas and jurisdiction was based upon 28 U.S.C. Sec. 1332, diversity of citizenship.

In their Original Answer, Defendants denied that the promissory notes were actually notes, and stated that they were merely "evidence of investments with the attendant risk of loss." However, Defendants averred in the alternative, that should they be promissory notes, that they were usurious.

A Rule 16 scheduling order was entered in April of 1988 which set January 31, 1989, as the deadline for filing Rule 56 motions.

Plaintiffs conducted discovery through requests for admissions, interrogatories and depositions, and Defendants declined to conduct any discovery on their usury defense,

even though they requested and received more time for discovery when Plaintiffs filed their first Rule 56 motion. Plaintiffs then filed a later Motion for Summary Judgment on January 19, 1989.

Plaintiffs' Motion for Summary Judgment was supported by answers to interrogatories, responses to requests for admissions, deposition testimony of Frame, and by supporting affidavit and other exhibits.

In their response to Plaintiffs' Motion for Summary Judgment, which Defendants filed on March 10, 1989, Defendants did not refute any of Plaintiffs' claims, but rather alleged in their pleadings, that the non-interest bearing notes, as part of the transactions (which they structured, solicited and promoted) were usurious. Defendants also included with their response a cross-motion for summary judgment, although such was filed in violation of the Rule 16 scheduling order and six weeks after the deadline established by the district court's order.

With their response, Defendants provided one affidavit of Suzanne Frame, and copies of transmittal letters for various promissory notes, and a business records affidavit.

None of the affidavits or letters provided by Defendants stated that loans were made; or that interest was charged or contemplated; or that interest was charged in excess of the legal rate; or that commissions were to conceal interest payments; or that there was any scheme to charge usurious interest. Likewise, there was no proof of what legal rate of interest applied. Defendants did not provide the court with any other affidavits or exhibits, and did not refer to any other affidavits.

Plaintiffs in their reply to Defendants' response objected to the untimely cross-motion and requested Rule 11 sanc-

tions against Defendant Frame and her attorney because the affidavit filed with their response was contradictory to a previous Frame affidavit. Plaintiffs also argued in their reply that even if the rate of interest charged was 25%, it would not be usurious since a 28% rate ceiling applied to business transactions over $250,000.00 under Texas law.

B. The District Court's Decision.

As an initial matter at the hearing on summary judgment, the Court queried Defendants' counsel as to whether his most recent pleading was a response to Plaintiffs Rule 56 motion or an untimely cross-motion, considering the Rule 16 deadline for such motions was six weeks prior to Defendants filing their pleading. Counsel for Defendants stated in open court that it was simply "a response" (transcript at Appendix D, p. 32a). The District Court granted Plaintiffs' Motion for Summary Judgment and in its Order, the District Court found that there was no evidence before it "that a loan was made or intended between the parties," and that "the summary judgment proof demonstrates that there was no loan of money, which is essential and requisite to a usury defense" (Appendix B, p. 22a). The District Court (Appendix B, p. 21a) cited *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) for the position of the Supreme Court that:

> In our view, the plain language of 56(C) mandates the entry of summary judgment after time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on

> which that party will bear the burden of proof at trial. *Id.* at p. 322.

The District Court also determined that under Texas law, a party asserting a claim of usury involving promissory notes not usurious on their face, must show that "there was a corrupt agreement or scheme to cover usury and that such an agreement or scheme was in full contemplation of the parties." The District Court then ruled that the notes did not have any rate of interest on their face and that "Defendants have not provided any summary judgment proof which supports that such a scheme to charge usury existed" (Appendix B, p. 22a).

In reconciling the two different affidavits signed by Frame and submitted by her attorney, Mr. Sharman, the District Court decided that the more recent affidavit did *not* show "the existence of usury" but that it was "carefully constructed to imply" the existence of usury, and "that Defendants intentionally and with bad faith skewed the true facts in hopes of preventing summary judgment" (Appendix B, pp. 24a-25a).

The district court further found that "the Defendants' commissions-as-usury defense seems to this Court to be a complete fabrication due to the stated intent of the Defendants as evidenced by the original affidavit" (Appendix B, p. 25a).

On that basis, the District Court, in addition to granting a $500,000.00 judgment on the promissory notes, awarded sanctions against Defendants and their counsel (Appendix B, pp. 27a-28a). Defendants filed their Notice of Appeal to the Fifth Circuit on June 30, 1989.

C. The Decision Of The Fifth Circuit.

In an opinion written by Judge Jerry E. Smith, the Fifth Circuit Court of Appeals determined that there was a usurious transaction regardless of the commercial solicitations by Defendants and the intentions of the parties to enter into a business enterprise. The Appellate Court determined that a commission on profits of 25% was to be considered interest and usurious, although the Fifth Circuit did not consider and made no finding, or reference to the legal rate of interest which applied to the transactions, the substance of this litigation, to determine if interest was "in excess" of the legal rate.

The Court then reversed the summary judgment for Plaintiffs and sanctions against Defendants, and further remanded the case to the District Court for entry of a summary judgment for Defendants on their usury claim, for determination of any penalties associated therewith, and further proceedings consistent with the decision.

D. Petition For Rehearing.

In their request for rehearing, Plaintiffs pointed out to the Appellate Court that Defendants did not have a cross-motion for summary judgment before the District Court and that both parties agreed on this point as set out in their statement of the case in their briefs. Plaintiffs also directed the Appellate Court's attention to the fact that neither Defendants nor the Fifth Circuit Court ever determined or proved what the legal rate of interest was, which is essential to their usury defense, usury being defined as the rate of interest charged in excess of the legal rate. The Appellate Court denied the Motion for Rehearing on August 22, 1990 (Appendix C, p. 29a).

REASONS FOR GRANTING THE WRIT

This writ should be granted because the Appellate Court has completely ignored the district court's Rule 16 scheduling mandates and is such a departure from the lower court's duties so as to call for this Court's power of supervision. Further, the Appellate Court's decision conflicts with this Court's decision in *Celotex* regarding Rule 56 burdens and proof as explained in detail below.

I. The Appellate Court Erred in Finding That Defendants Had a Cross Motion for Summary Judgment Before District Court and Ordering a Judgment Thereon.

In its opinion the Fifth Circuit Court stated:

> "Defendants asserted the affirmative defense of usury in response and filed a cross-motion for summary judgment. The court granted Plaintiffs' motion and denied Defendants'." *Najarro v. SASI International,* 904 F.2d 1002, at 1005 (Appendix A, pp. 3a-4a).

This statement is incorrect regarding a Defendants' cross-motion and a denial.

As set out in the statement of the case in both Appellants' and Appellees' briefs (at p. 2 of each), the *only motion before the district court was Plaintiffs' motion for summary judgment.*

Defendants did file a response with a cross-motion which was six weeks late and not in accordance with the District Court's Rule 16 scheduling order. At the summary judgment hearing, counsel for Defendants stated on the record that his pleading was *a response and not a cross-motion for summary judgment* (Appendix D, p. 32a). For this reason neither party on appeal contended

that a cross-motion for summary judgment was before the district court.

Among the objectives of Rule 16 as stated therein are: (1) expediting the disposition of the action; and (2) establishing early and continuing control so that the case will not be protracted because of lack of management. Section (b)(2) of Rule 16 mandates that the district court "shall" enter a scheduling order that limits the time to file and hear motions. Defendants did not file their cross-motion within the time limits of the scheduling order although they had a full opportunity to do so and the district court was within its discretion to not allow a motion past the time of its mandatory scheduling order.

Scheduling orders of the district court are essential to the orderly and efficient adjudication of cases and it serves no purpose for the Appellate Courts to ignore these scheduling orders at the expense of the district court.

In its decision, the Appellate Court ordered that this case be reversed and remanded to the district court for entry of summary judgment for Defendants (*Najarro, Id.* p. 1011; Appendix A, p.18a) even though Defendants did not have a Rule 56 motion pending before the district court. The Fifth Circuit also cited from *Celotex*:

> "In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery *and upon motion*, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial" (emphasis added) *Id.* at p. 1005 (Appendix A, pp. 4a-5a).

Petitioner contends that *Celotex* is controlling and that since Defendants did not have a motion for summary

judgment on their usury defense before the district court, the Appellate Court made an error of fact and law in remanding the case for judgment for Defendants.

In *Fountain v. Filson,* 336 U.S. 681, 69 S.Ct. 754, 93 L.Ed. 971 (1949), the Supreme Court reversed a summary judgment granted by the Appellate Court for the appellant who did not have a Rule 56 motion before the district Court. Although that decision stated that the Appellate Court considered a new issue raised on appeal, Plaintiffs contend that *Celotex* mandates that the appellant must have a proper Rule 56 motion before the district court to have summary judgment granted in its favor on appeal.

II. Appellate Court Failed to Find Proof of Essential Element of Usury Defense and Defendants Did Not Provide Any Proof.

a. No Finding or Proof of Interest in Excess of Legal Rate.

A finding that interest was charged in *excess* of the legal limit is essential to proving usury since under Texas Law usury is defined as "interest in excess of the amount allowed by law." Vernon's Ann. Civ. St. Art. 5069-1.01(d).

Article 5069-1.04 outlines three methods to determine the legal rate based upon the auction average rates quoted on a bank discount basis for 26-week treasury bills issued by the United States government as published by the Federal Reserve Board, for the week preceding the week in which the rate is contracted for, multiplied by two, and rounded to the nearest one quarter of one percent.

Completely absent in the Appellate Court's opinion is there any mention or finding of what the legal limit was

for these transactions or that a 25% rate would be usurious under Texas law pursuant to the pertinent statute, Vernon's Ann. Civ. St., Art. 5069-1.04, *Limit on Rate.*

Further, Defendants did not provide any calculations or proof either in the district or appellate courts as to what legal rates applied to the transactions to determine if they were usurious.

Therefore, as an essential element to a usury defense, the legal rate for any particular transaction must be determined, plead and proven. This was never done either by Defendants or the Appellate Court, and it is legally insufficient to assume usury as a matter of law without any such proof of the essential element as affirmatively required by statute.

b. *Celotex* Mandates Summary Judgment Where Failure to Prove Essential Element of Defense.

In citing *Celotex Corp. v. Catrett,* 477 U.S. 327, the Appellate Court stated:

> ". . . Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, *against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case,* and on which that party will bear the burden of proof at trial" (emphasis added). *Id.* at 322 (Appendix A, p. 5a).

The Appellate Court continued that under Texas law, usury is defined as "interest in excess of the amount allowed by law." Tex. Rev. Civ. Stat. Ann. Art. 5069-1.01(d) (Appendix A, p. 5a).

Therefore, in order to affirmatively prove usury, not only must the party with the burden show what rate of

interest was charged, but that the interest was "in excess of the amount allowed by law", as "an element essential to that party's case."

Regarding a non-moving party's burden to show proof of an element essential to its case, the Court in *Celotex* stated:

> ". . . a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Id.* at 323.

Furthermore,

> "The import of these subsections is that, regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied." *Id.* at 323.

Neither in the district court nor before the Fifth Circuit Court of Appeals did Defendants ever affirmatively show by affidavit or otherwise, using the calculations provided by Texas statute, that the 25% rate would be in excess of the legal rate allowed by law.

If the Fifth Circuit is permitted to let its opinion stand it would set a haphazard precedent that usury could be established without *any proof* of the applicable legal rate or that the interest rate charged was in *excess* of the legal rate, both of which are mandated and required by Texas

statute. This would also be contrary to the fundamental legal principles and summary judgment standards established in *Celotex*:

> "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose." *Id.* at 323-324.

In addition,

> "Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis." *Id.* at 327.

Therefore, since Defendants failed to affirmatively provide any proof to support their usury claim of interest "in excess of the amount allowed by law" and the Appellate Court did not make any such finding, Rule 56 and *Celotex* mandate that the district court's opinion be affirmed. Defendants were given more than sufficient time to establish the elements of usury and failed to do so.

c. The Appellate Court Erred in Assuming 25% Rate Usurious.

Although there was no proof presented by Defendants in the district or Appellate Court that 25% would be in excess of the legal rate under Texas law, Appellees did affirmatively plead in the district court that 25% would not have been in excess of the legal rate.

In their Memorandum of Law and Reply to Defendants' Response to Summary Judgment, Plaintiffs stated:

> "Even if 25% interest had been charged it would not have been usurious as a matter of law. For the sake of argument, even if our situation did involve a loan, and the promissory notes the subject of this litigation had stated that the interest would be at a rate of 25% per year, they would not be usurious under Texas law.
>
> Vernon's Ann. Civ. St., Art. 5069-1.04(b)(2), which mandates statutory ceilings on interest, states in part: . . . any contract which credit in an amount in excess of $250,000.00 is or is to be extended, or any extension or renewal of such a contract, and under which the credit is extended is for business, commercial, investment or other similar purposes . . . the limitation on the ceilings determined by those computations shall be 28 per cent a year."

Since a 25% rate of interest is within the 28% limit mandated by Texas statute, there is no usury, and Defendants never filed a response opposing Plaintiffs' contention of 28% being the applicable rate of interest.

In its summary of the pertinent facts, the Appellate Court stated in its opinion that:

> ". . . defendants solicited plaintiffs and other investors to participate with them in the business of purchasing European gray market perfume for resale in the United States. Plaintiffs CFL and Najarro, its president, tendered a total of $500,000 to Tenham Company, N.V. (Tenham), for which defendants signed six promissory notes. According to defendants, the money received by Tenham and later by SASI was used by those companies to purchase goods, principally brand-name perfumes, for importation into the United States." *Najarro,* 904 F.2d 1004 (Appendix A, pp. 2a-3a).

Therefore, as determined by the Appellate Court, the money invested was for a "business, commercial or other similar purposes" and in excess of $250,000, and under Art. 5069-1.04(b)(2) the 28% rate ceiling should apply.

As stated in *Celotex*:

> ". . . as we have explained, the burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Supra* at 325.

Since Defendants did not oppose or provide proof that the 28% rate ceiling did not apply, summary judgment for Plaintiffs was justified.

CONCLUSION

In order for a party to obtain summary judgment pursuant to Rule 56 it must timely file such a motion within the Rule 16 scheduling order. On appeal Defendants acknowledged that only Plaintiffs had a Rule 56 motion before the district court. Rule 16 requires a district court to set time limits for when Rule 56 motions must be filed, and an Appellate Court cannot ignore these filing dates set by the district court. Therefore, summary judgment was not available to Defendants under the circumstances, and the Appellate Court acted contrary to the rules when it granted summary judgment for the non-moving party.

Defendants failed to affirmatively provide any proof in the district court of the applicable legal rate of interest as an element to their usury claim, and the Appellate Court did not make a finding of what legal rate applied. It is an absolutely essential element to a defense of usury

to determine what legal rate of interest applied, in order to determine if a rate charged was in "excess" of that legal rates. Because there was no determination of the legal rate, by Defendants or the Appellate Court, the judgment of the district court should be affirmed.

Finally, since a 25% rate of interest is within the 28% limit allowed by Texas statute, and since Defendants offered no opposition to Plaintiffs' contention of 28% being the legal rate of interest, the district court's judgment should be affirmed.

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Armando Fong NAJARRO and
Compania Financiera Libano, S.A.,
Plaintiffs-Appellees,

v.

SASI INTERNATIONAL, LTD., and Suzanne Frame,
Defendants-Appellants.

No. 89-2731.

United States Court of Appeals,
Fifth Circuit.

July 6, 1990.

Rehearing Denied Aug. 22, 1990.

Action was brought to recover under notes. Usury defense was asserted. The United States District Court for the Southern District of Texas, David Hittner, J., granted summary judgment rejecting usury defense. Appeal was taken. The Court of Appeals, Jerry E. Smith, Circuit Judge, held that: (1) affidavits regarding parties' intent were not relevant on issue of whether transactions were loans or business investments; (2) commissions charged in connection with notes constituted "interest" for usury purposes; (3) showing of specific intent to commit usury was not prerequisite to establishment of usury defense; and (4) even if payment of interest at 25% rate was conditioned upon receipt of expected profit, transactions would have been usurious.

Reversed and remanded.

Charles A. Sharman, Brown, Maroney & Oaks Hartline, Houston, Tex., for defendants-appellants.

Keith G. Fabrizi, J.C. Trotter, Trotter, Trotter & Fabrizi, Houston, Tex., James L. Branton, San Antonio, Tex., for plaintiffs-appellees.

Appeal from the United States District Court for the Southern District of Texas.

Before CLARK, Chief Judge, WISDOM and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Plaintiffs Armando Fong Najarro and Compania Financiera Libano, S.A. (CFL), advanced funds to defendants SASI International, Ltd. (SASI), and its primary shareholder, Suzanne Frame, who ran a "gray market" perfume importing business. The agreement included a commitment by Frame and her company to pay, in addition to the principal, so-called "commissions" equal to a 25% annual return on the principal. When defendants failed to pay on six of the promissory notes, plaintiffs sued for $500,000, the face amount of the notes.

After first unsuccessfully claiming lack of jurisdiction, defendants now assert that the agreement under which money was advanced was usurious. The district court rejected this claim on summary judgment, holding that there was no loan, and, alternately, no scheme to charge usury. We reverse and remand.

I.

Through published offerings and commissioned brokers, defendants solicited plaintiffs and other investors to participate with them in the business of purchasing European

gray market perfume for resale in the United States. Plaintiffs CFL and Najarro, its president, tendered a total of $500,000 to Tenham Company, N.V. (Tenham), for which defendants signed six promissory notes. According to defendants, the money received by Tenham and later by SASI was used by those companies to purchase goods, principally brand-name perfumes, for importation into the United States.

Defendants assert that the notes they gave plaintiffs were structured so as to yield to plaintiffs a 25% annualized rate of return on principal, payable in cash every six weeks. According to defendants, from September 1985 through November 1986, when each note became due at the end of a respective six-week period, the principal amount was rolled over, the "commission" of 25% was paid, and new notes were issued. A total of 56 such notes were eventually issued. Beginning in May 1986, SASI replaced Tenham as obligor on the notes.

Defendants further maintain that each note was issued with a cover letter stating the principal amount, the due date, and a promise to pay a sum equal to an annualized 25% of the principal amount as a "commission." This information was not on the notes themselves, which made no mention of interest or "commissions."

In February 1987 plaintiffs brought this action seeking recovery of the $500,000 principal, together with pre- and post-judgment interest and attorneys' fees. Defendants filed a motion to dismiss for lack of subject matter jurisdiction and conducted limited discovery on that issue only.

Plaintiffs then moved for summary judgment on the face amount of the six promissory notes then remaining unpaid. Defendants asserted the affirmative defense of

usury in response and filed a cross-motion for summary judgment. The court granted plaintiffs' motion and denied defendants'. The court held that there was no evidence before it "that a loan was made or intended between the parties" and that "[t]he summary judgment proof demonstrates that there was no loan of money, which is essential and requisite to a usury defense."

The court also determined that under Texas law, a party asserting a claim of usury involving promissory notes not usurious on their face must show that "there was a corrupt agreement or scheme to cover usury and that such an agreement or scheme was in full contemplation of the parties." The court then observed that the notes did not have any rate of interest on their face and that "[d]efendants have not provided any summary judgment proof which supports that such a scheme to charge usury existed." The court also imposed sanctions on defendants and their counsel after concluding that a second affidavit by Frame, a director and the principal shareholder in Tenham and SASI, was in bad faith or a fabrication and that the usury defense had been asserted in bad faith or only for the purpose of delay.

II.

We apply the standard for summary judgment enunciated in *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986):

> Under Rule 56(c), summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' In our view, the

> plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

In their response to plaintiffs' summary judgment motion, defendants rely upon the affirmative defense of usury, on which they will bear the burden at trial unless the transaction is determined to be usurious on its face. Where the nonmoving party will bear the burden of proof at trial, *Celotex* instructs,

> . . . a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.' Such a motion, whether or not accompanied by affidavits, will be 'made and supported as provided in this rule,' and Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'

Id. at 324, 106 S.Ct. at 2553.

[1, 2] Under Texas law, usury is defined as "interest in excess of the amount allowed by law." Tex. Rev. Civ. Stat. Ann. art. 5069-1.01(d). The essential elements of a usurious transaction are (1) a loan of money; (2) an absolute obligation that the principal be repaid; and (3) the exaction from the borrower of a greater compensation than the amount allowed by law for the use of money by the borrower. *Holley v. Watts,* 629 S.W.2d 694, 696

(Tex. 1982). Where the transaction appears lawful on its face, the party claiming usury has the burden of proof. *American Century Mortgage Investors v. Regional Center, Ltd.*, 529 S.W.2d 578, 583 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.). On the other hand, where the loan instruments show on their face that the loan is usurious, the lender has the burden to prove that the terms of the loan resulted from accidental and bona fide error. *Miller v. First State Bank*, 551 S.W.2d 89, 99 (Tex. Civ. App.—Fort Worth 1977), *modified on other grounds*, 563 S.W.2d 572 (Tex. 1978).

A.

The district court's first ground for granting summary judgment for plaintiffs and rejecting defendants' usury defense was that there was no evidence before the court that a loan was made or intended between the parties. The court based its finding largely upon Frame's earlier affidavit testimony. In her first affidavit, filed in support of defendants' motion to dismiss for lack of subject matter jurisdiction and submitted before the usury defense was raised, Frame explained that there was no agreement that "the monies funded to Tenham were ever intended to be anything other than an investment. They were never intended to be a loan." Additionally, in response to requests for admissions, Frame, on behalf of SASI, stated that "[t]here was no borrowing or lending to default on the document. It was invested with SASI International Ltd."[1] Plaintiffs submitted this affidavit in reply to defendants'

1. At this earlier stage of the case, the defendants, rather than asserting usury, apparently were attempting to avoid liability by arguing that there was no enforceable obligation on Frame or SASI to repay the funds advanced.

response to plaintiffs' motion for summary judgment, in which defendants had filed a second and arguably contradictory affidavit by Frame in which the subject statements were deleted.[2]

On appeal, defendants in turn point to the first affidavit of John Trotter, which he executed, as trustee and counsel for Najarro and CFL, in response to defendants' motion to dismiss for want of jurisdiction. The Trotter affidavit, attached to plaintiffs' first amended complaint, states in part that "[t]he [original] action was brought after these funds were loaned to the named Defendants, SASI . . . and Frame, as evidenced by the promissory notes. . . . These funds that were loaned to the Defendants are owned by [CFL]." However, Trotter asserted through later affidavits that the funds "were never intended or contemplated to be loans or for the use of money, but were for the specific commercial purpose of facilitating the ongoing business transactions of buying European goods for resale."

[3, 4] We conclude that none of these affidavits presents any relevant summary judgment evidence on the issue of the loan.[3] Under Texas usury law, "in determining whether a loan transaction is usurious, it is substance rather than form that is investigated." *Fears v. Mechanical & Indus. Technicians, Inc.*, 654 S.W.2d 524, 530 (Tex. App.—Tyler 1983, writ ref'd n.r.e.). In *Gonzales County Sav. & Loan Ass'n v. Freeman*, 534 S.W.2d 903, 906

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2. This revision formed much of the basis for the district court's imposition of sanctions.

3. This determination obviates any need for us to consider plaintiffs' claim that the Trotter affidavit, when presented by the defendants in support of their usury claim, was never properly before the court.

(Tex. 1976), the court, in determining whether certain charges constituted interest under the usury laws, stated, "Charges which are in fact interest remain so, regardless of the label used." The court in *Skeen v. Slavik*, 555 S.W.2d 516, 521 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.), further expounded on this principle:

> [W]here . . . a charge is admittedly compensation for the use, forbearance, or detention of money, it is, by definition, interest regardless of the label placed upon it or the artfulness with which it is concealed. Indeed, the Supreme Court in *Gonzales Savings* held that we must look beyond the superficial appearances of the transactions to their substance in determining the existence or nonexistence of usury.

Just as the label placed upon a charge by the parties will not control the determination of whether that charge is interest, so a label placed upon the transaction by the parties should not control the determination of whether that transaction is a loan. Where the terms of the written contract between the parties unambiguously constitute a loan, and the parties have presented no evidence to show that the terms of that contract are not valid and enforceable, the name that the parties give to that contract is irrelevant for purposes of determining whether there was a loan for purposes of the usury laws.

B.

It is uncontested that plaintiffs advanced money to defendants on numerous occasions and that on each occasion, as a precondition to receiving that money, defendants signed a promissory note in an amount equal to the sum of money received. These notes, the last six of

which total $500,000 in principal, remain unpaid and form the basis of this suit. Each note reads, "Six weeks after [date], for value received, I, we, or either of us, the undersigned, promise to pay to the order of John C. Trotter, Trustee for Armando Fong Najarro [the amount] Dollars at [left blank] with [left blank] per cent interest per annum from [left blank] until paid." All were signed by Frame on behalf of SASI.

In determining whether there was a loan, we rely upon *Johns v. Jaeb,* 518 S.W.2d 857 (Tex. Civ. App.—Dallas 1974, no writ), which is controlling on this issue. There, the court stated,

> When money is advanced to enable one to engage in a business venture with the understanding that the advance and an added amount are to be returned, there is a loan, and the added amount is interest, which may not exceed the statutory maximum, regardless of the form of the transaction. Here the documents show an absolute obligation on the part of plaintiff to repay the amount advanced, together with an additional amount.

Id. at 859 (citations omitted). *Accord Maxwell v. Estate of Bankston,* 433 S.W.2d 229, 232 (Tex. Civ. App.—Texarkana 1968, no writ).

Therefore, even if plaintiffs' argument and affidavits showing that the advance of money was meant to be a business investment rather than a loan are taken as entirely true, the substance of the transaction is such that it is nonetheless considered a loan, as there is here indisputably an absolute obligation to repay the principal, as evidenced by the promissory notes. As the court stated in *Maxwell,* "the evidence in our opinion conclusively

evidences a loan as distinguished from an advance of working capital to a joint venture, because there was an absolute agreement between the parties that the principal was to be repaid." *Id.* at 233.

[5] Where it is uncontradicted, as here, that the substance of the transaction included an advance of money with an absolute obligation to repay, it is irrelevant whether the parties intended such a transaction to be classified as a loan. Where there was no mistake as to the terms of the agreement, a mistake in supposing that the contract was not usurious will not authorize reformation of that contract. *See Bexar Bldg. & Loan Ass'n v. Seebe,* 40 S.W. 875 (Tex. Civ. App. 1897, writ ref'd). Hence, we find that in the instant case the first two elements of usury—the existence of a loan and an absolute obligation to repay—were present.

III.

Plaintiffs do not appear to dispute that cover letters were attached to each of the promissory notes and read, in pertinent part, as follows:

> As agreed, we will receive from you on [date 1] [x dollars] to purchase perfumes from Europe.
>
> SASI International Ltd. will in return pay you the full amount of [x dollars] on [date 2] and an additional sum of [y dollars], which is your commission. Enclosed is a promissory note covering this transaction.

Each letter was signed by Frame, and date 1, which was always the same as the date of the promissory note, in each instance preceded date 2 by exactly six weeks; date 2 was the due date of the corresponding promissory note.

Also, in each case, the amount "y" was equal to 42/365 times .25 times x. Therefore, "y" was in each case equal to a 25% annualized rate of return on amount "x".

Thus, the summary judgment evidence shows that the entire agreement of the parties consisted of the payment of money by plaintiffs to defendants in consideration for (1) the issuance by defendants of promissory notes in the same amount to plaintiffs and (2) defendants' payment to plaintiffs of sums denominated as "commissions" in amounts equaling 25% per annum of the principal amounts.

[6] Moreover, plaintiffs did not perform any services for defendants other than the advance of money. As the court explained in *Maxwell,*

> In determining the question of usury all devices are disregarded, and whenever the courts are satisfied that there is a charge contracted for, *merely for the use of money,* in excess of that allowed by law as interest, they treat it as usurious, though usury may be covered under the guise of some additional and different consideration.

433 S.W.2d at 231 (emphasis added). Indeed, a charge made for the use, forbearance, or detention of money is interest, regardless of the label placed upon it or the artfulness with which it is concealed. *Skeen,* 555 S.W.2d at 521. The "commission" is just such a charge for the use of money.

[7, 8] Furthermore, the commissions were paid by defendants directly to the lenders, i.e., the plaintiffs, and not to a third-party broker. A party who merely lends his own money will not avoid a finding of usury by charg-

ing a fee or commission. *See O'Connor v. Lamb,* 593 S.W.2d 385, 387 (Tex. Civ. App.—Dallas 1979, no writ). "[A] charge or a deduction in the making of a loan to pay to so-called commission or brokerage is nothing but a device for the collection of additional interest, where the charge is made by the lender himself." *Terry v. Teachworth,* 431 S.W.2d 918, 925 (Tex. Civ. App. —Houston [14th Dist.] 1968, writ ref'd n.r.e.). Therefore, the "commissions" in the instant case necessarily constitute interest.

IV.

[9] As an alternative ground for granting summary judgment, the district court held that, since the notes are not usurious on their face, defendants had the burden to show that usury was intended but failed to meet this burden when they provided no "summary judgment proof which supports that such a scheme to charge usury existed." The court relied upon two Texas appellate opinions. In *Moss v. Metropolitan Nat'l Bank,* 533 S.W.2d 397, 399 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ), the court stated that where a note is not usurious on its face, the borrower must show a "corrupt agreement or scheme to cover usury and that such agreement or scheme was in full contemplation of the parties." *See also Greenway Bank & Trust v. Smith,* 679 S.W.2d 592, 597 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.) (citing *Moss*).[4]

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4. However, where a contract is usurious on its face, proving a corrupt scheme is not necessary. *See Ashley v. Edwards,* 626 S.W.2d 107, 111 (Tex. App.—Houston [14th Dist.] 1981, no writ) ("[I]f the contract is unambiguous upon its face, the court cannot depart from the terms of the contract to make legal what the parties have made unlawful."); *Maxwell,* 433 S.W.2d at 233 (" 'Where, indeed,

[10] We observe first that in the cases cited, the notes constituted the entire writing governing the transaction. Thus in those cases, where the *notes* were not usurious on their face, the burden was on the party asserting usury to show a corrupt agreement or scheme. However, where, as in the case *sub judice,* the note does not constitute the entire contract, we believe that Texas courts would still find the transaction usurious on its face if some other documents, which constitute part of the transaction and do not contradict the note, establish usury on their face.[5] Thus, we can distinguish our case from *Moss* and *Greenway* on the basis of the cover letters that expressly show a 25% annualized return on the money lent. However, we need not rely only upon this distinction to reverse the summary judgment.

[11, 12] The district court erred in placing upon defendants the burden of showing on the part of plaintiffs a specific intent to commit usury. In *Alamo Lumber Co. v. Gold,* 661 S.W.2d 926, 928 (Tex. 1983), the court declared, "[I]t is not the lender's subjective intent to charge usury that makes a loan usurious, but rather his

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the contract upon its very face imports usury, as by an express reservation of more than legal interest, there is no room for presumption, for the intent is apparent; res ipsa loquitur.' " (quoting *Bank of the United States v. Waggener,* 34 U.S. (9 Pet.) 378, 399, 9 L.Ed. 163 (1835)).)

5. *See Tygrett v. University Gardens Homeowners' Ass'n,* 687 S.W.2d 481, 485 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) ("The question of usury must be determined by a construction of all the documents constituting the transaction, interpreted as a whole, and in light of the attending circumstances."); *Beavers v. Taylor,* 434 S.W.2d 230, 231 (Tex. Civ. App.—Waco 1968, writ ref'd n.r.e.) ("All of the instruments referred to were executed simultaneously, and hence are construed as if contained in a single contract. None of the instruments upon their faces provided for the payment of more than the legal rate of interest, hence the contract is not usurious on its face" (citations omitted)).

intent to make the bargain that was made." In doing so, the court specifically rejected the argument that a specific intent to charge usury must be established where the documents do not show usurious interest on their face.

The court in *Alamo Lumber* cited its earlier decision in *Cochran v. American Sav. & Loan Ass'n,* 586 S.W.2d 849, 850 (Tex. 1979) (citations omitted), where it stated,

> Intent in usury cases does not mean intent to charge a usurious rate of interest. Rather, it means intent to make the bargain made. The subjective intent of the lender is irrelevant if, in fact, the lender has contracted for, charged or received interest on a loan in excess of the maximum permitted by law. To avoid the penalties imposed by article 5069-1.06, the lender is required to plead, prove, and obtain a finding that his contract for, charge or receipt of usury was a result of accidental and bona fide error.

Plaintiffs have made no such showing of accidental and bona fide error. They also put forth no evidence to show that they did not intend to make the bargain they made; that is, plaintiffs fail to demonstrate that they did not intend to collect a 25% return.

Moreover, plaintiffs' claim that they never intended to charge usury is foreclosed by *Johns v. Jaeb,* 518 S.W.2d at 860, where the court stated, "Defendant insists that he never intended to charge usury, but his subjective intent is immaterial, since the intent of the parties is presumed to be reflected in the documents which they signed."[6]

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6. *See also Ashley v. Edwards,* 626 S.W.2d 107, 111 (Tex. App. —Houston [14th Dist.] 1981, no writ) ("The subjective intent of the parties is normally immaterial in determining whether there is usury since the intent of the paries is presumed to be reflected in the documents which they sign.").

Accordingly, the summary judgment evidence demonstrates that plaintiffs intended to enter into a bargain that was usurious, and whether they intended specifically to charge usury is irrelevant.[7] As a consequence, under Texas law, the statutory penalties must be visited upon them.

V.

[13] In his affidavit, Trotter states, "If no profit was made on the resale, no commissions would be due, but the promissory notes would still be owed." Plaintiffs thus argue that any commission payments were contingent on a profit and hence should not constitute usurious interest. Some Texas courts indeed have espoused the proposition that when the promise to pay a sum above legal interest depends upon a contingency, the loan is not usurious. *See, e.g., Pansy Oil Co. v. Federal Oil Co.,* 91 S.W.2d 453, 457 (Tex. Civ. App.—Texarkana 1936, writ ref'd); *Beavers v. Taylor,* 434 S.W.2d at 231; *Wagner v. Austin Sav. & Loan Ass'n,* 525 S.W.2d 724, 731 (Tex. Civ. App.—Beaumont 1975, no writ).

However, more recent Texas cases have adopted a contrary rule. In *Dixon v. Brooks,* 604 S.W.2d 330, 334 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.), the court stated, "A contract is usurious as a matter of law if there is any contingency by which the

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7. In *RepublicBank Dallas, N.A. v. Shook,* 653 S.W.2d 278, 281-82 (Tex. 1983), the court in determining whether the transaction violated the usury laws, considered whether the borrower had a business purpose. However, this consideration did not affect the initial determination of whether the transaction was usurious, but only whether the corporate-shell borrower properly came within the exception to the usury statutes that permitted a higher interest rate for corporate borrowers.

lender may receive more than the lawful rate of interest." Similarly, "[a] contract is usurious if there is any mode or contingency by which the lender could receive more than the maximum rate of interest allowed by law." *Dixon v. Brooks,* 678 S.W.2d 728, 729 (Tex. App.—Houston [14th Dist.] 1984, no writ).[8]

Where the Texas Supreme Court has touched on the issue, it seems to favor the rule of the more recent appellate cases. *See Smart v. Tower Land & Inv. Co.,* 597 S.W.2d 333, 341 (Tex. 1980) ("The contract under construction will not be found usurious on its face unless it expressly entitles the lender, *upon the happening of a contingency or otherwise,* to exact interest at a rate greater than that allowed by law" (emphasis added)); *Shropshire v. Commerce Farm Credit Co.,* 120 Tex. 400, 30 S.W.2d 282, 285 (1930), *cert. denied,* 284 U.S. 675, 52 S.Ct. 130, 76 L.Ed. 571 (1931) ("[A] contract is usurious when there is any contingency by which the lender may get more than the lawful rate of interest, whether it is so apparent that it becomes the duty of the court to so declare, or whether it is a case in which it is necessary that the jury should find the facts.").

Moreover, the instant case is readily distinguishable from cases such as *Pansy Oil, Beavers,* and *Wagner.* In those cases, the amount to be paid for the use of the lender's money was entirely uncertain, as the interest was based upon a percentage of profits or sales which were themselves speculative. In the instant case, on the other

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8. *See also Ford Motor Credit Co. v. McDaniel,* 613 S.W.2d 513, 518 (Tex. Civ. App.—Corpus Christi 1981, no writ) ("The contract, to be usurious on its face, or to provide for the payment of unearned interest, must *expressly* entitle the lender, upon the happening of a contingency, to exact interest at a rate greater than that allowed by law" (emphasis in original)).

hand, the 25% return had been computed and written into the contract, and defendants, before the perfume sales even were made, obligated themselves to pay this specific sum as a "commission."

Therefore, even if Trotter's interpretation of the contract were accepted, the transaction is still usurious, since whenever defendants would make their expected profit, they would be obliged to pay interest at a 25% rate. Since plaintiffs present no evidence showing that defendants' agreement to pay commissions, as evidenced by the cover letter, was unenforceable by plaintiffs under *all* circumstances, the summary judgment evidence shows that there is a contingency by which defendants would be obligated to pay an unlawful rate of interest. Hence, the transaction is usurious.

VI.

[14, 15] Finally, plaintiffs assert that, because the defendants solicited plaintiffs' money and defendants structured the deal, defendants should be estopped to assert the defense of usury. This argument does not avail them. In almost all usury cases, it is the borrower who solicits the funds; lenders rarely force their money on unwitting borrowers.[9] Furthermore, "[a]s between the original parties to a transaction estoppel is not ordinarily applicable in usury cases." *Miller v. First State Bank,* 551 S.W.2d at 101. Moreover, even if estoppel were applicable to a suit asserting usury, estoppel is not available in the absence of evidence of deceptive conduct. *See id.*

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9. *See also Tanner Dev. Co. v. Ferguson,* 561 S.W.2d 777, 781 (Tex. 1977) ("[O]nce the agreed terms have been reduced to writing in the form of a compulsory contract, the test of alleged usury is not concerned with which party might have originated the alleged usurious provisions."); *Maxwell,* 433 S.W.2d at 234.

VII.

Accordingly, summary judgment for plaintiffs and sanctions against defendants are REVERSED. The case is REMANDED to the district court for entry of summary judgment for defendants on their usury claim, for determination and assessment of any appropriate penalties and forfeitures associated with a finding of usury under Texas law, and for further proceedings consistent herewith.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-87-483

ARMANDO FONG NAJARRO AND
COMPANIA FINANCIERA LIBANO, S.A.,
Plaintiffs,

v.

SASI INTERNATIONAL, LTD.
AND SUZANNE FRAME,
Defendants.

(Entered June 2, 1989)

ORDER

Armando Fong Najarro and Compania Financiera Libano, S.A. brought this diversity action pursuant to 28 U.S.C. § 1332 to recover for nonpayment of certain promissory notes issued and executed by Defendants, Suzanne Frame and SASI International, Ltd. This cause comes before the Court on Plaintiffs' Motion for Summary Judgment (Document #45) pursuant to Federal Rule of Civil Procedure 56.

This nonjury cause was filed by Plaintiffs on February 13, 1987. On January 30, 1989, Plaintiffs filed a Motion for Summary Judgment, within the January 31, 1989, motion cutoff date which was set by this Court in a previously entered scheduling order (Document #29). In a

new order, the Court gave Defendants until March 10, 1989, to respond to the Plaintiff's Motion for Summary Judgment, and gave Plaintiffs until April 3, 1989, to reply thereto (Document #46). Within those limits, Defendants filed their response and Plaintiffs filed their reply. A summary judgment hearing in this cause was held in open court on April 17, 1989.

The Court notes that Defendants initially attempted to include a cross-motion for summary judgment as part of their response, which would have been beyond the January 31, 1989, motion cutoff date. In open court, counsel for Defendants stated that the document filed on March 10, 1989, was a response and not a cross-motion to Plaintiffs' Motion for Summary Judgment (Transcript of April 17 hearing, Document #53, p. 5). This Court finds that if Defendants were to contend that their response was also a motion, the motion would be untimely.

As set out in Plaintiffs' complaint and summary judgment motion, and as supported by the summary judgment evidence, between October and November of 1986, Plaintiffs invested $500,000.00 in United States currency with Defendants for the purchase of various goods. Defendants executed and delivered to Plaintiffs and/or their authorized agent promissory notes in the following amounts with the following due dates:

Date Signed	*Note #*	*Amount*	*Due Date*
10-24-86	1427	$ 76,000.00	12-05-86
10-27-86	1432	40,000.00	12-08-86
10-27-86	1434	200,000.00	12-08-86
10-31-86	1442	60,000.00	12-12-86
11-11-86	1459	100,000.00	12-23-86
11-19-86	1477	24,000.00	12-31-86

No interest rate was reflected on the face of said notes. (The original promissory notes are attached to Document #21.)

In their response to summary judgment, Defendants do not contest Plaintiffs' claim but allege the defense of usury to the notes and the transactions which gave rise to those notes. Therefore, Plaintiffs are entitled to summary judgment, unless Defendants establish their affirmative defense of usury.

Rule 56(c) states that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In the case of *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S. Ct. 2548 (1986), the Supreme Court stated the rule that applies to motions for summary judgment:

> In our view, the plain language of 56(c) mandates the entry of summary judgment after time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial.

Id. at ____, 106 S. Ct. at 2552-53. As outlined by Defendants in their response, for there to be usury under Texas law, there must first be a loan of money. *Holley v. Watts,* 629 S.W.2d 694, 696 (Tex. 1982).

There is no evidence before this Court that a loan was made or intended between the parties. To the contrary, Suzanne Frame stated in an affidavit submitted to this

Court (Document #27) that these were business investments and never intended to be loans. In her affidavit attached to her most recent response (Document #47), Ms. Frame does not even once mention the word "loan" in support of Defendants' claims. In their response to a request for admissions attached to Plaintiffs' motion (Document #45, Ex. D-1, D-2), Defendants state that the notes were signed as an assurance of repayment for the investments and that there was no "lending or borrowing."

The summary judgment proof demonstrates that there was no loan of money, which is essential and requisite to a usury defense.

Additionally, under Texas law a party asserting a claim of usury involving a note which is not usurious on its face, has the burden to show that usury was intended:

> One who uses the defense of usury in a suit on a note that does not call for usurious interest on its face has the obligation to establish that there was a corrupt agreement or scheme to cover usury and that such agreement or scheme was in full contemplation of the parties.

Greenway Bank & Trust of Houston v. Smith, 679 S.W. 2d 592, 597 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.) (quoting *Moss v. Metropolitan Nat'l Bank of Houston*, 533 S.W.2d 397, 399 (Tex. Civ. App. —Houston [1st Dist.] 1976, no writ)).

The notes that are the subject of this litigation did not bear any rate of interest on their face. Defendants have not provided any summary judgment proof which supports that such a scheme to charge usury existed.

In response to Suzanne Frame's second affidavit, the Plaintiffs filed a motion for sanctions pursuant to Federal Rule of Civil Procedure 56(g). Although Plaintiffs did not move for sanctions pursuant to Federal Rule of Civil Procedure 11, if Rule 11 is violated, the court on its own initiative may impose sanctions. Fed. R. Civ. P. 11.

The Fifth Circuit has established the following affirmative duties under Rule 11 for attorney and litigant when signing a pleading, motion, or other document:

> (1) that the attorney has conducted a reasonable inquiry into the facts which support the document;
>
> (2) that the attorney has conducted a reasonable inquiry into the law such that the document embodies existing legal principles or a good faith argument "for the extension, modification or reversal of existing law"; and
>
> (3) that the motion is not interposed for purposes of delay, harassment, or increasing costs of litigation.

Thomas v. Capital Security Services Inc., 836 F.2d 866, 874 (5th Cir. 1988). Similarly, Rule 56(g) provides as follows:

> Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offend-

> ing party or attorney may be adjudged guilty of contempt.

Fed. R. Civ. P. 56(g).

Counsel for Defendants claimed in his signed response that the transactions involved in this suit were usurious. This defense was based on the ground that there was a loan of money to Defendants and that payments of interest were made at a higher than legal rate. The "interest" came from the artifice of charging a "brokerage commission."

Included with his response was an affidavit from Defendant Frame discussing the "investment" transactions. A previous Frame affidavit filed with the Court and attached to a response under Mr. Sharman's signature, states that Plaintiffs' funds were not "intended to be anything other than an investment. They were never intended to be a loan." Additionally, Ms. Frame verified in responses to requests for admissions that "there was no borrowing or lending," and the various letters that were attached to Defendants' response state that Plaintiffs' money was to be used to purchase goods as part of the "investment." They never mention the word "loan" or "interest."

The more recent affidavit of Suzanne Frame seems to this Court to be carefully constructed to imply that the brokerage commissions were artificial and, therefore, usurious. The crucial language evidencing that the transaction was never "intended to be anything other than an investment" and was "never intended to be a loan" was conspicuously deleted. Although this Court does not believe that Defendant's more recent affidavit shows the existence of usury, the Court believes that Defendants

intentionally and with bad faith skewed the true facts in hopes of preventing summary judgment. The Defendants' "commissions"-as-usury defense seems to this Court to be a complete fabrication due to the stated intent of the Defendants as evidenced by the original affidavit.

Therefore, counsel for Defendants knew or should have known that he could not support the defense of usury because Plaintiffs' funds were admittedly not loans, or counsel wholly failed to make a reasonable inquiry into facts which supported (or in this case didn't support) the Response which he signed, in violation of Rule 11. Further, this Court finds that the second affidavit was made in bad faith or for the purpose of delay, which is violative of Rule 56(g).

Rule 11 sanctions are mandatory.

> There are no longer any "free passes" for attorneys and litigants who violate Rule 11. Once a violation of Rule 11 is established, the rule mandates the application of sanctions. This appears to be the only construction consistent with the plain language of the rule.

Thomas v. Capital Security, 836 F.2d at 876. Where a district court determines an attorney's conduct to be a violation of Rule 11, that court must then fashion an appropriate sanction in accordance with the dictates of Rule 11. *Id.*

This being the requirement, the Court is of the opinion that Plaintiffs' are entitled to reasonable attorney's fees incurred as a result of these Rule 11 and 56(g) violations. After a review of the affidavit submitted by Plaintiffs' counsel, the Court is of the opinion that the amount of

$6,650 shall be awarded as reasonable and appropriate attorney's fees in accordance with *Willy v. Coastal Corp.*, 855 F.2d 1160 (5th Cir. 1988), which would comprise the time and expense to reply to Defendants' Response, and the affidavit and other exhibits attached thereto, and which were reasonably necessary. The fees shall be recovered from Defendants' attorney, Charles A. Sharman, and from Defendants SASI International, Ltd., and Suzanne Frame, jointly and severally. Therefore, it is

ORDERED that Plaintiffs' Motion for Summary Judgment be, and is hereby, GRANTED.

SIGNED at Houston, Texas, on this 31st day of May, 1989.

/s/ DAVID HITTNER
David Hittner
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-87-483

ARMANDO FONG NAJARRO AND
COMPANIA FINANCIERA LIBANO, S.A.,
Plaintiffs,

v.

SASI INTERNATIONAL, LTD.
AND SUZANNE FRAME,
Defendants.

(Entered June 2, 1989)

FINAL JUDGMENT

Pursuant to this Court's order of this same date, the Court

ORDERS that Armando Fong Najarro and Compania Financiera Libano, S.A., have judgment against the Defendants, Suzanne Frame a.k.a. Suzanne de Lyon, individually, and SASI International, Ltd., jointly and severally, as follows:

1. Five Hundred Thousand Dollars ($500,000.00) as actual damages.

2. Sixty-seven Thousand, Five Hundred Dollars ($67,-500.00) as prejudgment interest, which has been calculated from January 30, 1986, which is more than 30 days after the maturity of each note the subject of this order, to April 30, 1989, at the rate of 6 percent per annum.

3. Fifty Thousand Dollars ($50,000.00) as attorney and collection fees; and

4. Postjudgment interest on the amount of actual damages, interest, sanctions, and attorneys fees, from the date this Final Judgment is signed until paid, at the rate of 10 percent per annum.

Additionally, the Court ORDERS that Armando Fong Najarro and Compania Financiera Libano, S.A., recover from the Defendants, Suzanne Frame a.k.a. Suzanne de Lyon, individually, and SASI International, Ltd., and recover from Defendants' attorney, Charles A. Sharman, jointly and severally, Six Thousand Six Hundred Fifty Dollars ($6,650) as an award for sanctions as reasonable attorneys fees incurred as a result of the Rule 11 and 56(g) violations. The Court further

ORDERS that Plaintiffs shall have all writs of execution and other process necessary to enforce this judgment, and this order shall be effective and enforceable as to said Defendants, including any assumed names which they may use now or in the future. All relief not expressly granted herein is denied.

SIGNED at Houston, Texas, on this 31st day of May, 1989.

/s/ DAVID HITTNER
David Hittner
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-27131

ARMANDO FONG NAJARRO, ET AL.,
Plaintiffs-Appellees,

versus

SASI INTERNATIONAL, LTD., and
SUZANNE FRAME, an Individual,
Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING

(August 22, 1990)

Before CLARK, Chief Judge, WISDOM and SMITH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ J. SMITH
United States Circuit Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Case No. H-87-483

ARMANDO FONG NAJARRO, and
JOHN C. TROTTER, Trustee for
ARMANDO FONG NAJARRO

vs.

SASI INTERNATIONAL LTD. and
SUZANNE FRAME, an Individual

Houston, Texas
April 17th, 1989
10:00 A.M.

HEARING
BEFORE THE HONORABLE DAVID HITTNER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs:

Mr. John Trotter
Mr. Keith George Fabrizi
Trotter, Trotter and Fabrizi
7100 Clarewood, Suite 100
Houston, Texas 77036

For the Defendants:

Mr. Charles A. Sharman
Brown Maroney & Oaks Hartline
1300 Wortham Tower
Houston, Texas 77002

Court Reporter:

Fred Warner
515 Rusk Avenue
Houston, Texas 77002

Proceedings recorded by mechanical stenography, produced by computer-aided transcription.

* * *

[4]

other motions would be considered, and the cross motion was filed two months and two weeks after close of motions under this Court's order and that's two years and two months and two months and two weeks after this case was filed, so almost 24 months, Your Honor, two years and four months. After this case was originally filed, they finally decided to file a cross motion for summary judgment in this case and well outside the orders of this Court.

THE COURT: Okay.

Mr. Sharman.

MR. SHARMAN: Yes, Your Honor. Well, first of all, I think the plaintiffs themselves have invoked the parol evidence rule concerning these promissory notes that have been placed into evidence. I think under that rule the question, the notion of whether this is an investment or a loan is irrelevant to proceedings. We have got a suit for a promissory note.

THE COURT: How about time? Why was this filed late?

MR. SHARMAN: This was filed as response to their motion for summary judgment.

THE COURT: A cross motion as a response?

MR. SHARMAN: Well, Your Honor, because we pled this as both a defense to the note and as an affirmative defense to the note and as a counterclaim, the response and the cross motion are really one in the same.

THE COURT: Is it a motion or is it a response?

[5]

MR. SHARMAN: Well, Your Honor, I would be perfectly willing to withdraw my cross motion and proceed to trial on these issues. I don't want to waste the Court's time and efforts on something that I think—

THE COURT: No, sir. You are not answering the question.

You tell me, since when is a response changed into a motion for summary judgment?

MR. SHARMAN: Because the response, I guess because the response shows on its face there is no possibility of a recovery by the plaintiffs.

THE COURT: So is it a motion or is it a response? If it's a motion, it's not a response, and if it's not a response, you have got troubles there to.

MR. SHARMAN: Well, it's a response, Your Honor.

THE COURT: Go on.

MR. SHARMAN: Thank you.

The undisputed facts in the case is the money was transferred, the $500,000 was transferred as part of a whole series of transactions, the six particular notes being sued on for the last six of a series of 57 notes. All 57 notes were issued to Mr. Trotter as agent for company Financier de le Bono. The were also charged, my clients were charged interest that was 25 percent annual rate of return. All those payments were made, although they were denominated as commission, but the law is

* * *